

Kelly Construction of Indiana, Inc. and Sheet Metal Workers' International Association Local Union No. 20, a/w Sheet Metal Workers' International Association, AFL-CIO and Indiana State Pipe Trades Association and UA Local No. 157, a/w United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO. Cases 25-CA-24005, 25-CA-24244, 25-CA-24611, 25-CA-24693, 25-CA-25916, and 25-RC-9751

May 2, 2001

DECISION, ORDER, AND DIRECTION OF
SECOND ELECTION

BY CHAIRMAN TRUESDALE AND MEMBERS
LIEBMAN AND HURTGEN

On May 11, 1999, Administrative Law Judge Irwin H. Socoloff issued the attached decision. The Respondent and General Counsel filed exceptions, supporting briefs, and answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order as modified.³

We adopt the judge's conclusion that the General Counsel met the initial burden of proving discriminatory motivation for the Respondent's refusal to hire 27 union applicants, but that the Respondent has proved that it would not have hired them, for legitimate reasons, even in the absence of their union affiliation. The judge's analysis of the refusal-to-hire allegations is consistent with the Board's decision in *FES*, 331 NLRB 9 (2000), which issued subsequent to the judge's decision. Therefore, contrary to our dissenting colleague, we find that no useful purpose would be served by remanding the refusal-to-hire allegations to the judge.

¹ The General Counsel and the Respondent have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² In adopting the judge's decision, Member Hurtgen finds it unnecessary to pass on the judge's discussion of Objection 9, his findings that Mike Daugherty is a supervisor, and that the Indiana State Pipe Trades Association is a labor organization.

³ We shall modify the judge's recommended Order to provide narrow cease-and-desist language, as the Respondent's unfair labor practices do not warrant imposition of a broad order. See *Hickmott Foods*, 242 NLRB 1357 (1979).

In this connection, we note that the judge found, *inter alia*, that the Respondent made its hiring decisions based on the neutral application of legitimate and nondiscriminatory policies, one of which was a preference for hiring applicants who were accustomed to earning wages within the range the Respondent would pay.⁴ See *Wireways, Inc.*, 309 NLRB 245 (1992).⁵ Our review of the record convinces us that the judge's finding is correct.⁶ Indeed, as noted by our dissenting colleague, the record shows only one deviation from this policy, i.e., that applicant Koel Gaylord was hired at \$8 per hour despite a prior wage rate of \$9.50 per hour. This isolated and marginal deviation from the Respondent's policy fails to show that the policy was not applied in a neutral manner with respect to the alleged discriminatees and consequently is insufficient to defeat the Respondent's *Wright Line* defense.⁷ Thus, the preponderance of the record evidence supports the judge's key finding that the Respondent would have made the same hiring decisions regardless of the salts' union affiliation, because the salts did not satisfy the Respondent's lawful hiring criteria, at least with respect to the wage the applicants were accustomed to

⁴ The policy is tied to the Respondent's desire to retain satisfactory employees as long as possible. The dissent asserts that the Respondent knew that the salts *could* have remained for 6 months under the Union's salting program. However, this is not to say that they *would* have remained. Further, the Respondent's policy is premised on the concern that traditional high wage earners will not remain with Respondent for very long. The work prospects of salts are irrelevant to this policy.

⁵ Chairman Truesdale notes that the Board has held that a policy of not hiring applicants with current high wage histories is a legitimate justification for a refusal to hire, in the absence of evidence that it has been applied in a disparate manner to avoid hiring union applicants. See *Wireways, Inc.*, *supra*. The General Counsel did not allege, nor does he argue, that the Respondent's policy was itself discriminatorily motivated and inherently destructive of employees' Sec. 7 rights. Chairman Truesdale therefore declines to address these theories in this case. See *Northside Electrical Contractors*, 331 NLRB 1564 fn. 2 (2000).

⁶ Contrary to our dissenting colleague's contention, the judge's analysis is consistent with *Sunland Construction Co.*, 309 NLRB 1224 (1992), because the finding quoted above establishes that the refusals to hire were "based on neutral hiring policies, uniformly applied." *Id.* at fn. 33.

In agreement with *Sunland*, *supra*, Member Hurtgen agrees that a hiring policy is lawful if it is neutral and uniformly applied. Contrary to the dissent, that policy need not be "openly promulgated" or "widely disseminated." In addition, the policy herein is not alleged to be discriminatorily motivated.

⁷ *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See also *Merillat Industries*, 307 NLRB 1301, 1303 (1992). ("[I]t is to be remembered that Respondent is required to establish its *Wright Line* defense only by a preponderance of the evidence. The Respondent's defense does not fail simply because not all the evidence supports it, or even because some evidence tends to negate it.")

earning.⁸ In view of the absence of significant record evidence to undermine the Respondent's contention with respect to this hiring policy, we find no merit to the dissent's contention that a remand is necessary.⁹ Accordingly, we affirm the judge's conclusion that the Respondent's refusal to hire the salts did not violate the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Kelly Construction of Indiana, Inc., Lafayette, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order, as modified.

1. Substitute the following for paragraph 1(c).

"(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Substitute the attached notice for that of the administrative law judge.

IT IS FURTHER ORDERED that the election held in Case 25-RC-9751 is set aside and that the case is remanded to the Regional Director for Region 25 to conduct a new election when he deems the circumstances permit the free choice of a bargaining representative.

[Direction of Second Election omitted from publication.]

MEMBER LIEBMAN, dissenting in part.

I dissent from the dismissal of the complaint allegation that the Respondent unlawfully refused to hire the 27 overt union salts.¹

My colleagues do not disturb the judge's findings that the record is "replete with evidence" of the Respondent's willingness to resort to unlawful means "to keep the union out," that the Respondent knew that the salts were all

union activists, and that, accordingly, the General Counsel established that antiunion animus was a motivating factor in the Respondent's decision not to hire the salts. I agree with the General Counsel that, in light of the strength of his case of unlawful discrimination, "any and all defenses proffered by the Employer . . . must be carefully scrutinized and not merely accepted at face value."

For the Respondent to meet its *Wright Line* defense,² it must establish that the refusals to hire were "based on neutral hiring policies, uniformly applied." *Sunland Construction Co.*, 309 NLRB 1224, 1229 fn. 33 (1992). In my view, that would include showing that the policies were not merely an ad hoc response to the union campaign but were: (1) in existence before the organizational effort; (2) openly promulgated; and (3) widely disseminated among the personnel involved in the hiring process. Here, however, the judge failed to specifically address whether the Respondent met its burden with respect to these three elements of its affirmative defense.

Further, while Chairman Truesdale is correct that the General Counsel is not contending that the Respondent's hiring policies are per se unlawful,³ the General Counsel does argue that those policies were not uniformly applied. Although the Respondent presented testimony that it preferred to hire applicants with wage expectations in line with its payscale, applicants referred by employees and customers, applicants likely to be permanent, and applicants with skills to match its needs, the record shows deviations from these supposed preferences. Thus, for example, the record shows that the Respondent hired applicant Koel Gaylord at a wage rate of \$8 per hour notwithstanding the fact that he requested a wage rate of \$11 per hour and his prior wage rate was \$9.50 per hour. Similarly, the record shows that on three occasions during the time period in which the salts applied the Respondent deviated from its policy of hiring applicants referred by its employees and customers. Lastly, while the Respondent claimed to prefer applicants likely to be permanent, its safety director testified that, in practice, a 6-or 7-month period of employment was considered acceptable. Significantly, the Respondent knew that the salts could have remained employed for 6 months under the Union's salting program, but nevertheless re-

⁸ In view of our finding that the record supports the Respondent's argument concerning its consideration of the applicants' wage histories, Chairman Truesdale finds it unnecessary to pass on whether the Respondent has shown that its other purported hiring policies were legitimate and neutrally applied.

⁹ Contrary to our dissenting colleague's suggestion, a different result would not be warranted by a finding on remand that certain other hiring policies were not uniformly applied by the Respondent. While such a finding might bolster the General Counsel's case in meeting his initial burden, it would not be sufficient to overcome the record evidence of a practice of only hiring applicants with a wage history similar to what the Respondent would pay. That evidence shows that the Respondent would not have hired the applicants even in the absence of their union affiliation, and thus any further findings suggesting unlawful motivation would not warrant a different result. Further, as to the Respondent's *Wright Line* defense, it is sufficient that the Respondent has shown a valid reason that demonstrates the applicants would not have been hired in the absence of their union affiliation. It is immaterial that the Respondent has not shown multiple valid reasons for its actions.

¹ In all other respects, I agree with my colleagues' decision.

² *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

³ I have previously stated my view that *Wireways, Inc.*, 309 NLRB 245 (1992), could be undermining the enforcement of the Act in the construction industry. See *Benfield Electric Co.*, 331 NLRB 590, 592 fn. 6 (2000). Nevertheless, because neither the General Counsel nor the Charging Party has argued in this case that *Wireways* should be reexamined, I agree with the Chairman that that issue should be left for another day.

jected them in part because they allegedly failed to satisfy the “permanency preference.”

Apparently recognizing the weakness in the judge’s analysis, my colleagues attempt to construct a “fix” of their own. Emphasizing that the record shows only one deviation from the supposed policy of hiring applicants with wage expectations in line with the Respondent’s payscale, the majority reasons that the Respondent has shown that that policy was neutrally applied. Because the salts earned wages in excess of what the Respondent was offering, my colleagues conclude that the Respondent has established a meritorious *Wright Line* defense “at least” with respect to the wage policy.

In a case turning on employer motivation, however, the Board should not pick and choose among the reasons offered by the employer to justify its actions. The majority, by focusing only on one reason offered by the Respondent, neglects to scrutinize the record evidence suggesting that other so-called policies were not uniformly applied but, rather, were asserted in this case as convenient pretexts to justify not hiring the salts.

I believe the case should be remanded to the judge to analyze the refusal-to-hire allegations under the *FES*⁴ framework, to decide whether the Respondent’s hiring policies were truly neutral and uniform, and to address the evidence relied on by the General Counsel that undermines the Respondent’s affirmative defense. Should the judge find that some or all of the various asserted reasons were false, the judge could infer that the true reason was an unlawful one which the Respondent endeavored to conceal.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge, lay off, or issue written disciplines to employees because of their union activities or sympathies.

WE WILL NOT coercively interrogate applicants and employees about their union activities and the union activities of others, threaten employees with discharge and other reprisals if they engage in union activities, promulgate and maintain a no-solicitation policy for discriminatory reasons, promulgate and enforce an overly broad no-solicitation and no-distribution rule, inform employees that we will not hire or consider for hire applicants’ union activities under surveillance, and create the impression among employees that their union activities are under surveillance.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board’s Order, offer David Brown, Stephen Crabb Sr., Jay Struthers, and Chad Emmons full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make whole the above-listed employees for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board’s Order, remove from our files any reference to the unlawful discharges or layoffs of Brown, Crabb, Struthers, and Emmons, and WE WILL rescind and remove from our files any reference to the unlawful disciplines issued to Crabb, and WE WILL, within 3 days thereafter, notify each of the effected employees, in writing, that this has been done and that the discharges, layoffs, and disciplines will not be used against them in any way.

KELLY CONSTRUCTION OF INDIANA,
INC.

Walter Steele, Esq. and Joseph B. Shuttoni, Esq., for the General Counsel.

William W. Cody, Esq., of St. Louis, Missouri, for the Respondent-Employer.

William R. Groth, Esq., of Indianapolis, Indiana, for UA Local No. 157.

DECISION

STATEMENT OF THE CASE

IRWIN H. SOCOLOFF, Administrative Law Judge. Upon charges filed on June 7, 1995, October 2, 1995 and April 9, 1996, as thereafter amended, by Sheet Metal Workers’ Interna-

⁴ *FES*, 331 NLRB 9 (2000).

tional Association Local Union No. 20, a/w Sheet Metal Workers' International Association, AFL-CIO, herein referred to as Local 20 and, or, the Sheet Metal Workers' Union, and upon charges filed on May 9, 1996, and March 19, 1998, as thereafter amended, by Indiana State Pipe Trades Association and UA Local No. 157, a/w United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, herein referred to, respectively, as the Pipe Trades Association and Local 157 and, or, the Pipefitters' Union, against Kelly Construction of Indiana, Inc., herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 25, issued a Consolidated Complaint dated May 30, 1997, as amended at trial, alleging violations by Respondent of Section 8(a)(3) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended, herein called the Act. Respondent, by its Answers, denied the commission of any unfair labor practices.

Pursuant to notice, trial was held before me in Lafayette, Indiana, on February 3, 4 and 5, March 9, 10, 11 and 12, and April 27, 28, 29 and 30, 1998, at which the General Counsel and the Respondent were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence. Thereafter, the parties filed briefs which have been duly considered.

On July 14, 1998, pursuant to the Board's Order dated July 9, 1998, I issued an Order consolidating Case 25-RC-9751 with the unfair labor practice cases for purposes of hearing, ruling and decision concerning the representation case issues raised by duly filed objections to an election conducted on April 16, 1998, and by certain challenged ballots. Thereafter, further hearing, with respect to those matters, was conducted on October 5 and 6, 1998, after which the parties filed supplementary briefs limited in scope to the representation case matters.

Upon the entire record in these cases, and from my observations of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, operates a facility located in Lafayette, Indiana, and is engaged in the business of performing, inter alia, specialty industrial sheet metal fabrication work. During the year preceding issuance of the Consolidated Complaint, a representative period, Respondent, in conducting its business operations, purchased and received at the Lafayette, facility, goods valued in excess of \$50,000, which were sent directly from points outside the State of Indiana. I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. LABOR ORGANIZATION

Local 20, Local 157 and the Pipe Trades Association are, each, labor organizations within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. Background

Kelly Construction of Indiana commenced operations in May, 1994, under the direction of its president, Dean Benson, formerly the general superintendent of Kelly Construction of Decatur, Illinois, an unrelated company. As an industrial general contractor, Respondent performs carpentry, iron work, cement work, masonry and metal fabrication, indeed, everything in the industrial field except electrical work. Kelly does 90 percent of its work for its industrial customers, some 10 percent for small manufacturing companies (commercial work) and does not engage in any residential work. The Company employs some 8 office workers, and 25 to 27 shop employees, at its Lafayette, locale, and, in addition, has workers at its customers' sites, including 40 to 45 employees at two AE Staley cornmilling plants in Lafayette (the Staley North and South plants), the principal field worksites.

The shop employees fabricate and assemble, for use in customer factories, large vessels and tanks as well as generating systems, scrubbers, cyclones, electrical panels and duct work for industrial ventilation systems (such as dust collection systems), using heavy gauge metal. These employees also paint the equipment they make and perform general labor work in and around the shop. While certain individuals are hired as welders, the shop employees are not otherwise broken down into specific job classifications, and they perform a variety of tasks. In fact, even the welders do many different types of work. Thus, the Company looks to staff its shop, primarily, with "jacks of all trades." At the field sites, Respondent employs iron workers, millwrights, carpenters, concrete finishers, laborers, pipefitters and pipewelders, most of whom work at various tasks. At least at the Staley plants, Kelly does not employ sheet metal workers. Rather, sheet metal work is performed by the iron workers and the millwrights.

The Company president, Benson, reports directly to the owner, Dave Rathje. One Frank Bradshaw worked for Kelly Construction for 2 years, beginning in the Fall of 1994, as shop superintendent. As of November, 1994, the shop was still under construction and Bradshaw's job included the hiring of a shop crew and setting up the shop for fabrication work. Production began late in December of that year. An individual named Bob Phillips was employed by Kelly from January, 1995, until June, 1996, as the safety director, in charge of setting up a safety program inside the shop and for the outside locations. Phillips also performed personnel duties.

The current shop manager, Dave Daugherty, and the general superintendents in the field, Kent Grotjan and Andy Leithliter, report directly to Benson. Under Dave Daugherty are the shop foremen, Mike Daugherty and Jeff Marsh. Among the field foremen are Deon Ramsey and, until recently, Rick Fortin.

It is undisputed that Benson, Bradshaw, Phillips, Grotjan, Ramsey and Fortin were, at relevant times, statutory supervisors. The supervisory status of Mike Daugherty, while denied by Respondent, is amply established by the record evidence.

Local 20 employs Michael Van Gordon as an organizer. In that capacity, Van Gordon supervises the Union's "youth to youth" or apprentice "salt" program under which third-year

apprentices are, temporarily, for a period of about 6 months, removed from their regular jobs, and hired by Local 20, to work as organizers and to seek employment with non-union employers. Van Gordon instructs the apprentice “salts” when to leave non-union jobs they may have obtained and to return to their former employers.

In the instant case, the General Counsel contends that Respondent violated Section 8(a)(3) of the Act by refusing to hire, and failing to consider for hire, some 27 Local 20 “salts” who applied for positions on various dates during 1995, and thereafter. The General Counsel also argues that Kelly engaged in further Section 8(a)(3) violations by its early 1995 discharges of employees Anthony Elliot and Alberto Rodriguez, because of their membership in the Sheet Metal Workers’ Union, and by its 1996 discharge of David Brown, and layoffs of Stephen Crabb, Sr., Jay Struthers and Chad Emmons, because of their support of the Pipefitters’ Union. Respondent asserts that the “salts” were considered for jobs, but not offered positions, for lawful nondiscriminatory reasons,¹ and that Elliot and Brown were discharged for misconduct, Crabb, Struthers and Emmons were properly selected for layoff for economic reasons and, finally, that Rodriguez abandoned his employment and was not discharged. Also at issue is whether the Company violated the Act by requiring employees to update their employment applications, interrogating applicants and employees about their union activities and sympathies, requiring applicants to remove and conceal union insignia, promulgating and enforcing a no-solicitation policy, threatening employees with discharge and other reprisals because of their union activities, informing employees that Respondent would not hire applicants who had engaged in union activities and that it had laid off employees for engaging in such activities, changing its hiring procedures so as to require job applicants to submit applications through the Indiana Workforce Development (INET), engaging in surveillance of employees’ union activities and creating the impression among employees that their union activities were under surveillance.

¹ Kelly also argues that, in light of the substantial record evidence showing that applicants in the “youth to youth” program were available to work for it for a temporary period, only, before returning to their former employers, and evidence that they sought employment with Kelly not to organize it, but in order to close it down, these applicants were not *bona fide* employees within the meaning of the Act. In view of my disposition of the matter, *supra*, I need not pass upon these precise contentions.

B. Facts and Conclusions²

1. Allegations of interrogations, threats, changes in application and hiring procedures, rule changes, requiring applicants to remove union insignia, surveillance and creating the impression of surveillance

Anthony Elliot participated in Local 20’s “salt” program for third-year apprentices from September, 1994, until March, 1995, on leave of absence, he testified, from his employer, the A to Z Sheet Metal Company. A to Z allowed Elliot to take leave pursuant to an understanding that he would return in about 6 months. Like others in the program, Elliot, while working as a “salt,” was paid as an employee of the Sheet Metal Workers’ Union, at the wage rate specified in its contract with A to Z for apprentices of his experience level, plus benefits as mandated in that contract. When, later, Elliot obtained employment with Kelly, he was, pursuant to the “salt” program arrangement, paid by the Union the difference between the contract rate and the wage rate he earned at Kelly, plus benefits and, also, an additional \$2 per hour for “salting.” Such employment, for “salting” purposes, falls outside the strictures of the indenture agreement signed, annually, by all apprentices, requiring repayment by the apprentice to the Union’s apprentice committee, for the cost of training, if the apprentice should accept employment with an employer not signatory to a collective-bargaining agreement with the Union.

Elliot applied for work with Respondent in mid-November, 1994, in response to a newspaper advertisement seeking individuals able to perform shop layout work, welders, laborers, pipefitters and steamfitters. He was hired by Bradshaw in early December, at \$13.50 per hour, to do sheet metal layout work, the most highly skilled and highest paid position in the shop. Elliot did not reveal his union affiliation. Shortly after he was hired, Bradshaw told Elliot that he was being groomed for a supervisory position. Also in December, 1994, Respondent hired another apprentice participant in the Local 20 “salt” program, Alberto Rodriguez, without knowledge of his union affiliation.³ Rodriguez, on leave of absence from Brite Sheet Metal Company, was hired by Kelly at \$7.00 per hour, as a helper, to assist with sheet metal work in the shop and perform general laborer tasks. Both Elliot and Rodriguez were informed when interviewed and hired by Bradshaw, as were all other applicants and employees, that Respondent was seeking to build a permanent work force and wanted, only, employees interested in permanent positions.

Bradshaw testified that, on or about January 10, 1995, he interviewed a job applicant, not further identified in the record,

² The fact-findings contained herein are based upon a composite of the documentary and testimonial evidence introduced at trial. Where necessary to do so, in order to resolve significant testimonial conflict, credibility resolutions have been set forth, *infra*. In general, I have relied upon the testimony of Respondent’s former shop superintendent, Bradshaw, who impressed me as a thoroughly honest and forthright witness in possession of a good recollection of significant occurrences.

³ Like Elliott, Rodriguez, on instructions from Van Gordon, falsified his job application so as not to reveal prior employment by a signatory to a collective-bargaining contract with the Sheet Metal Workers’ Union.

who told him that he was a member of Local 20 and was seeking a temporary position with Kelly as, under the Union's rules, he could only work for a non-signatory employer, such as Kelly, while he was "between jobs." According to Bradshaw, it occurred to him that Elliot, who, as noted, was being trained to assume supervisory responsibilities, might be similarly situated and might not be a permanent employee. It is undisputed that Bradshaw then approached Elliot on the shop floor, in the presence of Rodriguez and other employees, and asked him if he was a member of the Sheet Metal Workers' Union. When Elliot said, yes, Bradshaw asked the employee what his intentions were, and Elliot said, "to organize." Bradshaw asked if that meant that Elliot was not a permanent employee but, rather, was there for a temporary period, only. Elliot responded, stating that that was so, and that he could not remain permanently in Kelly's employ. Prior to this conversation, neither Elliot nor Rodriguez had revealed their union membership. According to both Elliot and Rodriguez, one week later, about January 17, after Rodriguez, too, had made plain his union sympathies, they were approached by Bradshaw who told them that they were to do their jobs and, if they "played dirty," he, Bradshaw, would "play dirty," too. Bradshaw, in his testimony, denied that the latter conversation occurred.

Based on the undisputed testimony, I find that the interrogation of Elliot, who had not, theretofore, openly engaged in union activities or revealed his union sentiments, by a high level supervisor and in the presence of other employees, concerning his union membership, was coercive. Respondent thereby violated Section 8(a)(1) of the Act. For the reasons noted at footnote 2 concerning my favorable impressions of Bradshaw as a witness, and because both Elliot and Rodriguez appeared to me to testify in a manner calculated to advance the position of Local 20, rather than in an honest effort to report events, I credit Bradshaw's testimony denying that he threatened to "play dirty." This allegation of the complaint must be dismissed.

Shortly after the January 10, conversation, Benson posted a no-solicitation policy in the shop, prohibiting solicitation by employees during working time, and distribution of literature on working time and in working areas. Concurrently, Benson and Bradshaw conducted meetings of employees in the shop's conference room at which they spoke against unionization and showed an anti-union film. According to the testimony of the safety director, Phillips, the rule was posted in response to the activities of 6 or 7 employees who were selling candy in the shop, which was disruptive. On the other hand, Benson testified that he posted the rule after learning that an employee had solicited another employee to leave Kelly and accept a job with a different employer. Yet, Benson, in his testimony, could not explain the relationship between that type of conduct, not even referenced in the new rule, and the rule's broad prohibitions upon solicitation and distribution which, theretofore, was permitted in the shop.

In light of the timing of the promulgation, the concurrent anti-union animus displayed by Respondent, and the inconsistent and unpersuasive reasons offered by Kelly to explain the rule's inception, I am persuaded that the no-solicitation policy was instituted and maintained for anti-union reasons, only, to discourage organizational efforts by the employees. Nonetheless,

Respondent argues, the Compliant allegations concerning this matter should be dismissed as untimely under Section 10(b) of the Act as the offending conduct, although necessarily known to the Sheet Metal Workers' Union since the time it occurred, was first raised by it in its amended charge in Case 25-CA-24005, dated October 30, 1996. Nor, Respondent further asserts, is the subject conduct at all related to the matters raised in the original charge filed in that case on June 7, 1995, dealing with refusals to hire, refusals to re-employ and interrogation. I reject this argument since the evidence shows that the rule was promulgated on the heels of the unlawful interrogation of Elliot by Bradshaw, and in response thereto, and, thus, arose from the same factual circumstances or sequence of events as the allegations contained in the timely filed June 7, 1995 charge.⁴ By promulgating and maintaining the no-solicitation policy, Respondent violated Section 8(a)(1) of the Act.

On January 11, 1995, William Smith, a journeyman sheet metal worker and a member of Local 20, applied for a job with Kelly at the request of a union official. That very day, Smith had accepted employment with another company. He was interviewed by Phillips and, according to Smith, Phillips asked Smith to take off the union hat he was wearing as Phillips' boss "didn't like unions." Smith refused to do so, he testified, and the interview proceeded. On the contrary, Phillips testified that he never made a request of an applicant to remove union insignia. As will appear further, *infra*, I found Smith's testimony, overall, concerning the job interview, improbable and lacking the ring of truth. Accordingly, I am unwilling to base an unfair labor practice finding solely upon his uncorroborated testimony, and in the face of Phillips' believable denial of the matter asserted. I conclude that the incident complained of did not, in fact, occur, and that the Complaint allegation in this regard must be dismissed.

The Complaint alleges that in January, 1995, Respondent discriminatorily changed its employment application procedures by requiring applicants to update their applications,⁵ and, in November of that year, discriminatorily changed its hiring procedures by requiring applicants to submit their applications through Indiana Workforce Development (INET), all in violation of Section 8(a)(3) of the Act. Phillips credibly testified that the first action was taken on his recommendation, shortly after he started with Kelly in January, because, as a new company, Respondent had hired people both from resumes and hastily filled out applications, and the personnel files lacked accurate information concerning such items as addresses (used to calculate per diem payments) and telephone numbers. Benson credibly testified that Respondent took the second action, in the Fall, so as to take advantage of a free service to Indiana businesses offered by a state agency, an unemployment office, thereby saving a lot of time for Phillips which he previously spent screening applications and, also, reducing office disruption. In its post-hearing brief, the General Counsel advanced no arguments in support of the allegation concerning updated

⁴ See *Nickles Bakery of Indiana*, 296 NLRB 927 (1989).

⁵ Despite the allegation's reference to "applicants," the evidence shows that it was "employees" who were required to update their applications, that is, fill out new ones.

applications, and made scant argument dealing with the change in hiring procedures, perhaps in tacit recognition that the record evidence simply won't support those allegations. The subject Complaint paragraphs must be dismissed.

Dominick Cora, as part of his participation in the Local 20 "salt" program, applied for work at Kelly on March 27, 1995. Cora did not reveal his union membership, and he falsified both his employment and his wage history on the Kelly application form. Cora, whose permanent employer is New Jac Metal Fab, was hired by Kelly early in April, as a "field measurer" and a shop employee, at a wage rate of \$10 per hour. He revealed his union affiliation to Respondent's officials in August, 1995, and told them that his participation in the "salt" program would end about September 1, and he would return to New Jac. Benson asked Cora to remain with Kelly, but Cora declined, explaining that, in order to do so, he would have to re-pay the union's apprenticeship committee for the cost of his training, since Kelly was a non-signatory employer.

According to Cora's uncontradicted testimony, which I credit, as such, and note for background purposes, on his first day of employment, in April, supervisor Mike Daugherty told him that Kelly "had bitter feelings towards" Local 20, and would close before it would let the Union take over. Cora further testified that, following a safety meeting held on May 16, he overheard Phillips tell shop employees Kyle Minnear, Bob Hanes and two others, that the Company had to "be careful right now who we hire because of the . . . two union members that were on economic strike" (Elliot and Rodriguez). Cora's testimony in this regard was not corroborated, and was denied by Phillips. Cora also testified that, in the same time period, he overheard Phillips state on the telephone that he was nervous about having hired two "union boilermakers out of Oklahoma." Later that same day, Cora testified, he overheard Phillips tell Benson, in the shop, that he had "fired the two union boilermakers that day." Again, Cora's testimony was uncorroborated, and was denied by Phillips. Further, Phillips testified that the Company did not have boilermakers working for it.

The General Counsel urges that findings are warranted, based upon Cora's above-referenced testimony concerning alleged overheard conversations, that Respondent, by Phillips, violated Section 8(a)(1) of the Act by informing employees that it would not hire applicants who supported the Union, and that it had fired employees because of their union activities. As I found Cora's testimony concerning the overheard conversations unpersuasive, and as his testimony in those regards was not corroborated, and was credibly denied, I am unwilling to rely upon it and, based solely thereon, to make the unfair labor practice findings sought by the General Counsel. These allegations stand unproven, and must be dismissed.

Benson testified that he developed a document entitled "Interview Questions Shop Applicants" sometime in 1995, after he learned that Elliot had solicited employees to leave Kelly and take other jobs, and after Elliot's and Rodriguez' separation from employment at Kelly, described, *infra*, at which time he, Benson, concluded that they had never had any intention of remaining with Kelly as permanent employees. The reason for the questionnaire, Benson further testified, was to aid the Company in its efforts to hire people with an interest in long-term

employment with the Company. However, Phillips, who did much if not most of the interviewing of applicants in 1995, credibly testified that he passed out the document in question, only, during orientation, after the individual receiving it already had been hired, and not to applicants. In November and December, 1995, new hires David Brown, Chad Emmons and Cory Van Meter were required to respond to the questionnaire. Among the questions contained in that document are the following:

17. Have you recently been employed or are you currently employed by anyone else, or currently receive compensation from any other employer or organization?
18. If you do receive such other compensation or hold other employment, are you to continue that during your employment with our company—or do you expect to return to that employer or organization?
19. If employed by this company, do you intend to be in the employment or receive compensation from any other employer or organization?

While, as hereafter found, Respondent had a legitimate interest in building a permanent work force staffed by individuals desirous of long-term employment, it had no rule against dual employment,⁶ arguably justifying the type inquiries contained in the questionnaire. The questions set forth above were, in the circumstances, thinly veiled inquiries about union affiliation, asked of those already hired, and were coercive. Also, Brown, Emmons and Van Meter all credibly testified that, in addition to the matters covered by the questionnaire, they were directly questioned, during their respective meetings with Phillips, about union membership. Based upon the above, I find that, as alleged in the Complaint, late in 1995, Respondent, by Phillips, violated Section 8(a)(1) of the Act by interrogating applicants and, or, new hires concerning their union membership and activities.

At a principal customer site, the Staley North plant, Kelly's highest ranking official, at all relevant times, was Kent Grotjan, the general superintendent. Under him were a foreman, Deon Ramsey, who later was promoted to the position of superintendent, and another foreman, Rick Fortin. It is undisputed that, in mid-March, 1996, a pipefitter under Fortin's supervision, Stephen Crabb, accompanied by his fellow employee, David Brown, and in the presence of other members of the piping crew, told Fortin that he, Crabb, "was there to help organize" for Local 157. Fortin told him "not to do it on company time."

Cory Van Meter, a laborer assigned to the crew, testified that, later that same morning, Fortin asked him if he, Van Meter, had been approached at any time about the Union by Crabb. Fortin also asked the employee just who it was that Crabb had been talking to. Thereafter, Van Meter further testified, Fortin, from time-to-time, would ask Van Meter if he was "going union," and to reveal what he had been told by Crabb and employee David Brown. At the times he was allegedly ques-

⁶ Cf. *Little Rock Electrical Contractors*, 327 NLRB 932 (1999).

tioned, Van Meter was not a "known" union supporter, and, in fact, was not even a member of Local 157. Fortin, in his testimony, stated that "I don't recall interrogating anybody."

Based upon my impressions of his demeanor as he testified, I did not find Fortin a reliable witness. On the other hand, Van Meter appeared to me to be testifying truthfully and I credit his account of his encounters with Fortin, and reject Fortin's very general denial. By questioning Van Meter, in March, 1996, about his union activities and sympathies, and those of his fellow employees, Respondent, by Fortin, violated Section 8(a)(1) of the Act.

At the end of March, 1996, employee Crabb engaged in handbilling on behalf of the Pipefitters' Union outside the clock-in gate at the Staley North plant, before working hours. Although outside the plant, and in or by the parking lot, the area occupied by Crabb was, apparently, a part of the Staley premises. Later that day, he was summoned to appear in the office trailer where Grotjan, Ramsey and Fortin met with him. Grotjan told Crabb that it was against Staley policy to solicit anywhere on their property. Crabb asked where the Staley property line was, and Grotjan said that he, Grotjan, did not know, and that Crabb was not to solicit on Staley property again. Thereafter, Crabb handbilled on a city street, adjacent to the Staley lot, without interference.

Respondent argues that the rule applied to Crabb was a Staley rule, and not a Kelly rule. Nonetheless, Kelly, by promulgating and enforcing such an overly broad rule at the plant, whether in its name or in Staley's, prohibiting all solicitation and distribution on non-work time and in non-work areas, violated Section 8(a)(1) of the Act.⁷

Two other employees assigned to the piping crew at the Staley North plant, Jay Struthers and Chad Emmons, testified about separate incidents when statements were made by supervisors about the screening of applicants, allegedly in the February to March, 1996, period. Thus, Struthers, in his testimony, stated that, prior to a safety meeting held in February or March, Phillips told the employee that Benson had instructed him, Phillips, "to start screening applicants because of trying to keep the Union out." Emmons testified that, in March, shortly after Crabb revealed his membership in the Pipefitters' Union, Fortin told him that Respondent was "going to have to screen the applicants a little better to try and keep the union guys out." Phillips, in his testimony, generally denied ever telling a Kelly employee that the Company would not hire applicants who engaged in union activities. Fortin testified that he did not, in March, 1996, tell any employees that Respondent would not hire, or consider for hire, applicants who are union members.

Struthers and Emmons impressed me as truthful witnesses, and I credit their testimony. As earlier noted, I did not find Fortin a reliable witness and I discredit his above-referenced denial of wrong doing. I found Phillips' general denial of

Struthers' testimonial assertions less persuasive than the employee's testimony. Accordingly, I conclude that, in February and, or, March, 1996, Respondent, by Phillips and Fortin, violated Section 8(a)(1) of the Act by informing employees that Respondent would not hire, or consider for hire, applicants for employment who are union members.

Jeff Dyer and John Crayz are pipefitters who work for Kelly at Staley North under Grotjan and Ramsey. Dyer testified that, on March 12, 1998, some 5 weeks before the election conducted by the Board among the fitters and welders, he drove, after work, to a union meeting at the Radisson Hotel in Lafayette, off Highway 26. As Dyer turned off the highway, and into the hotel area, he saw Grotjan, in a Kelly vehicle, stopped at a red light nearby the hotel. Dyer waived at the general superintendent and, then, proceeded on to the hotel parking lot, while Grotjan continued on the highway.

Crayz testified that he, too, drove to the meeting on March 12, and that fellow employee Darrell Wiser was his passenger. Crayz parked his car in the hotel lot, some 350 to 400 yards from Highway 26, and as he and Wiser got out of the car, Wiser set an empty beer bottle on the parking lot, next to Crayz' car.

On the next day, March 13, at work, Grotjan approached Crayz at 8:00 a.m., threw his hands up in the air and said, "I can't believe you guys are fucking me like this." Grotjan then proceeded to thank Crayz for Darrell Wiser, the "new union organizer."⁸ When Crayz protested, Grotjan asked him "well what were you doing at the union meeting?" Crayz then denied he was at the meeting, to which Grotjan responded, "yes you was, I seen Darrell put a Michelob bottle next to your car." At that point, Crayz admitted that he had attended the meeting. Grotjan then asked him why he wanted a union and, then, told Crayz "if you want to go union why don't you just go."

Grotjan testified that he drives on Highway 26, by the Radisson, daily, to and from work. On March 12, when he and Dyer saw each other, and waived to each other, Grotjan testified, he was on his way home. After arriving home, and showering, Grotjan, about 40 minutes later, used Highway 26 again, and returned to the Radisson. He did so, he testified, looking for Benson and Company Attorney Cody, who was staying at the Radisson during that week, a trial week in the instant case. Grotjan drove about the Radisson parking lot, looking for Benson's vehicle or Cody's vehicle, did not see either, and, so, left the hotel lot. Grotjan never got out of his own vehicle to enter the hotel and see if Benson and, or, Cody was there. In the course of searching the parking lot, he testified, he spotted Crayz and Wiser departing Crayz' car. According to Grotjan, he was there, looking for Benson and Cody, so as to discuss the day's trial events. Grotjan, in further testimony, did not dispute Crayz' account of their conversation on the next day, March 13, explaining that he and Crayz were friends and that Crayz had previously expressed to him a disinterest in the Union.

I found Grotjan's explanation of his actions in driving about the Radisson parking lot, at the start of a union meeting for the employees he supervised, illogical and entirely lacking the ring

⁷ Contrary to Respondent, I am of the view that the Complaint allegation dealing with the promulgation and enforcement of this unlawful rule, in response to Crabb's solicitation and handbilling activities, is closely related to the May 9, 1996, charges, timely filed by Local 157, concerning "harassing union supporters," and other unlawful activities, in the same time frame and at the same locale.

⁸ That morning, Grotjan had received a written communication from the Pipefitters' Union, describing Wiser as a "volunteer union organizer."

of truth. It is rejected in favor of the obvious inference to be drawn from the circumstances, that Grotjan was there to keep watch upon the employees' union activities, and find out who was attending the meeting. On the next day, according to Crayz' highly credible and, essentially, uncontradicted testimony, Grotjan made full use of what he learned from the surveillance, for further unlawful purposes. General Counsel's case is a very strong one that Respondent, by Grotjan, engaged in unlawful surveillance of the employees' union activities on March 12, and, on March 13, created the impression that the employees' union activities were under surveillance, interrogated employees about their union activities and threatened employees with discharge and other reprisals if they continued to engage in union activities, all in violation of Section 8(a)(1) of the Act. I so find and conclude.

2. Elliot's discharge and Rodriguez' termination of employment

It is undisputed that Bradshaw, the shop superintendent, was pleased, initially, with Elliot's job performance. The record contains no evidence of any dissatisfaction with Rodriguez' work. As earlier noted, they, like the Company's other employees, were required to complete new job applications on or about January 16, 1995. While Elliot, in his second application, continued falsely to claim that J & R Sheet Metal Company was his last employer, Rodriguez, in his second application, put down information at variance with that contained in his first application. Thus, in his application dated December 7, 1994, Rodriguez falsely claimed to have worked for Ace Sheet Metal Co., Inc., in Patterson, New Jersey, from August, 1991, until November, 1994. In the second document, dated January 16, 1995, Rodriguez truthfully listed Brite Sheet Metal Company as his employer from August, 1991, until September, 1994, and Local 20 as his employer thereafter.

By January 16, 1995, the employees in Respondent's shop had begun to work 12-hour days. On that date, Elliot told Bradshaw that he would not, or could not, work the overtime hours and, Bradshaw testified, he told Elliot that he needed everyone in the shop to work the longer days. Thereafter, Elliot continually left work, without permission, after working an 8-hour shift and, in some cases, after working less than the 8 straight-time hours. On February 3, Benson and Bradshaw met with Elliot about the matter, and the employee admitted that he had been leaving work early and, in response to inquiry from the Company executives, Elliot categorically refused to work 12 hours per day, as Respondent was requiring of all shop employees. Benson and Bradshaw then suspended Elliot, without pay, for 2 days. Upon his return, he and Rodriguez met with Bradshaw, on February 6, demanded a pay increase for all shop employees and, when Bradshaw turned them down, they announced that they were going on an economic strike. They so informed the shop employees, and left.

In this time period, Benson and Bradshaw learned that, in January, Elliot had induced an experienced welder in the shop, A. J. Wilson, to quit his job at Kelly and accept other employment. Elliot had told Wilson that he, Elliot, was a member of Local 20, and that the Union had placed him with the Company to "get the good people out of Kelly Construction so we can

close it down."⁹ They also learned that, later in the month, Elliot had told the shop foreman, Mike Daugherty, that Kelly "wasn't going to be around 90 more days," and had offered to help Daugherty find another job. In this same time frame, the Company discovered, by comparing Rodriguez' first and second applications, that one or both of them contained falsehoods concerning the employee's past work experience. Under Company rules, as set forth on its applications, misrepresentation or omission of facts on the document is cause for dismissal.

Late in February, some 3 weeks after their strike began, Elliot and Rodriguez returned to Kelly and told Bradshaw that they were making unconditional offers to return to work. Bradshaw told them that their jobs had been filled and that they were under investigation, and should complete new job applications, which they did. Subsequently, Benson and Bradshaw met with Elliot to discuss his "stripping" Wilson from the Company's employ. Elliot falsely denied having done so, but Benson told him that Respondent's investigation revealed that he had, and that he was fired. At trial, Benson testified that he discharged Elliot for inducing one of Kelly's better employees to seek other employment, for lying to Benson about having done so and for refusing to work overtime and repeatedly leaving work in the middle of the day.

Respondent informed Rodriguez, when he met with Bradshaw in late February, that he was under investigation for falsifying information on his application. Then, upon inquiry, Benson learned that past employers listed by Rodriguez did not exist. Benson instructed Bradshaw to meet with the employee and find out if there was an explanation. Bradshaw attempted to set up a meeting with the employee, at its Lafayette, locale, but Rodriguez repeatedly refused to report unless it was for the express purpose of returning to work. He would not come in for purposes of a meeting. On March 3, 1995, Benson sent a letter to Rodriguez stating that "I regard you not reporting as an indication of lack of interest, and intentional failure to report, and your abandoning employment with this company." At trial, Benson testified that Rodriguez was never discharged, but, rather, he failed to "show back up."

In light of the blatant hostility toward employee union activities displayed by Respondent throughout 1995, and, thereafter, and the Company's knowledge of the union affiliation and organizational activities of both Elliot and Rodriguez, the discharges of those employees, within weeks after Respondent learned of their union membership, warrants the inference that Respondent took those actions for reasons proscribed by the statute. However, in my view, the Company has shown that it would have terminated these employees even absent their protected conduct and, so, shown that they were not discharged in violation of Section 8(a)(3) of the Act. Regarding Elliot, it is preposterous to argue that any employer, under any circumstances, would retain an employee engaged in an avowed and systematic effort to lure away the employer's best workers in order "to close it down." On that basis alone, and without even considering the evidence that Elliot refused to work the same hours as the other shop employees, I conclude that Respondent

⁹ Wilson subsequently returned to Respondent's employ, several weeks later, and revealed these facts to Respondent's officials.

has demonstrated that the discharge of Elliot was for lawful reasons. As to Rodriguez, his outright refusal to report to Respondent's facility to discuss the material discrepancies contained in his job applications, and at a time when his dismissal was not a foregone conclusion, was, also, ample grounds for dismissal, and an action which nearly any employer would have taken under the circumstances. I therefore find and conclude that the discharges of these employees were not violative of the Act.

3. The applicants

Throughout 1995, and thereafter, Kelly Construction maintained a policy under which employment applications it received were kept "active" for 15 days and, then, placed in an inactive status. During the course of 1995, and into 1996, some 27 Local 20 "salts" applied for work with Kelly, "overtly," that is, fully revealing their union affiliation, and none of them were hired. In the January 9, to 11, 1995, period, Brian Stout, a participant in the Local 20 "salt" program for third year apprentices, applied, as did journeymen William Smith and Ricky Underwood. On May 23, 1995, Gabriel Brooking, Aaron Dailey, Jason McKinney, Donald McQueen, Jr., Jim Santacrose, Ronnie Sims, Peter Williams and Bobby Wright, participants in the apprentice "salt" program, appeared at the Kelly office as a group and filed applications. On October 9, 1995, apprentice "salt" program participants Anthony Abel, Douglas Barkdull, Greg Burke, Ronald Cornwall, Theodore DeFronzo, Jr., Thomas Gray, James Hail, Lonnie Hegg, Stephen Hill, Todd Huyghe, Brady Piercefield, Stephen Rogers, George Sears and Ken Walden, along with Union officials John Reese and Michael Van Gordon, went to the Kelly office, together, and completed employment applications. Many of them re-applied on October 25, 1995, and a few of them submitted third applications on January 16, 1996. During the periods that at least some of the foregoing applications were active, January 9, 1995, to January 26, 1995, May 23, 1995, to June 7, 1995, October 9, 1995, to November 9, 1995, and January 16, 1996, to February 1, 1996, and immediately adjacent to those time periods, Respondent hired a truckdriver, two welders and five laborers or helpers. In its brief, the General Counsel urges that at least the laborer or helper positions, which "required little, if any, prior job experience," would have been offered to the "salt" applicants if lawful hiring criteria had been employed.

Benson credibly testified that the Kelly shop employees, in their fabrication, cutting and assembling work, use a heavy gauge metal. They do not perform heating and air-conditioning work,¹⁰ and do not handle the light gauge metal used to fabricate the duct work for light commercial and residential heating and air-conditioning systems (HVAC work), the type work principally performed by the Local 20 apprentices. By design, the vast majority of the workers Kelly hires, as shown by the record evidence, are referred to it by Kelly employees or Kelly customers. While Respondent hires certain employees proficient at doing specialized work, such as Elliot, who was hired to do layout work, it has a preference for hiring, to staff its shop, inexperienced laborers who are trained on the job to do

fabrication work "the way we like things to be built." Such employees, typically hired at \$7 or \$8 per hour, are, among other things, taught to fabricate metal, over a period of years, and, when they become experienced fabricators, can earn up to \$14 per hour. Kelly also looks to hire employees whose wage expectations and past hourly earnings are in line with its own pay structure. In this connection, Benson testified that "I can't see that anyone would be happy making \$7 or \$10 an hour and used to making \$20 an hour." Finally, Benson further testified that, as earlier noted, and as communicated to all applicants by Bradshaw and Phillips, Respondent, in seeking to build its Company, was interested, only, in hiring workers who desired permanent employment.

The shop and field laborers hired within and about the above-referenced periods when the "salts" applications were active, met the stated criteria. On January 16, 1995, Kelly hired Karl Blichenstaff, as a laborer in the shop, at \$7 an hour. Blichenstaff had no prior experience in construction work, was referred by Kelly employee Robert Allen and did not have a history of earning more than Kelly paid. On May 24, 1995, it hired Kevin Vail, as a shop laborer, at \$8 per hour. Vail was referred by Shop Foreman Mike Daugherty, and had worked in sales, on commission, since leaving high school. On June 14, 1995, the Company hired Rene Rubalcava, as a laborer/plasma operator in the shop, at \$7 per hour. Rubalcava, referred by Phillips, had most recently performed seasonal work as a fire-place installer at \$8.50 per hour. On October 26, 1995, Kelly hired Koel Gaylord, as a field laborer, at \$8 per hour. Gaylord had been referred by Superintendent Grotjan, and had most recently worked as a machinist at \$9.50 an hour. On January 26, 1996, the Company hired Curtis Dalton, as a shop laborer, at \$8 per hour, on the recommendation of his brother, an existing employee. Dalton had most recently worked as a laborer at \$7 an hour. In addition to the laborers, Kelly hired Terry Baer on October 28, 1995, as a truckdriver, at \$8 per hour; Ryan Mounts on January 9, 1995, as a shop welder, at \$9 per hour and Mike Mills in late January, 1995, as a field welder, at \$14 per hour.

As noted, in the early January, 1995, period, Local 20's Underwood, Smith & Stout filed applications with Kelly. None of them were referrals of Kelly employees or customers, and all wore union hats when they appeared at the Kelly office. Underwood, a journeyman laid off from his most recent position, sought a job as a sheet metal welder, at a desired salary of \$21 per hour. Smith, also a journeyman, with extensive experience in HVAC installation, sought a salary of \$20 an hour, in line with his past earnings.¹¹ Stout, a third year apprentice in the "salt" program, sought an "HVAC installer or shop" position, at

¹⁰ Indeed, any such incidental work is subcontracted.

¹¹ Among other things, Smith testified that Phillips actually hired him, to start work the next day, at a \$14 hourly wage but, after being briefly called out of the room, returned and recanted the offer. According to Smith, his employment was not conditioned upon a physical examination and a drug test, as required of all other prospective employees of Kelly. Phillips, in his testimony, denied that he offered Smith a position. Rather, he testified, he told Smith that Kelly was hiring, only, "inexperienced laborers" at \$7 an hour. I found Phillips' testimony the more credible, and I rely upon it, as opposed to the less likely version of events offered by Smith.

an open salary. His application reflected current employment by Local 20, and previous employment as a sheet metal worker, at \$11.80 an hour, as part of his training. In his testimony, Stout stated that he knew the "salt" program would last for a 6-month period, after which he returned to his former job at the Apex company.

On May 23, 1995, eight members of the Local 20 "salt" program, none of them referrals, arrived together at the Kelly offices, wearing union hats, and filled out applications. Gabriel Brooking, in his application, sought a position as a "sheetmetal worker," at an open salary, and he showed current employment with Local 20, as an organizer, and past employment with Ralph R. Reeder, as an apprentice. As he previously arranged with that employer, Brooking returned to Reeder at the end of his 6-month "salt" service. Aaron Dailey, in his application, sought a position as a "sheet metal worker," at \$8.50 per hour, and showed current employment by Local 20, as an organizer, and past employment by Brite Sheet Metal, as a sheet metal worker, at \$14.44 per hour. Dailey testified that, while working for Local 20, he knew that his job at Brite was waiting for him and, in fact, at the end of the "salt" program, he returned to that employer. Jason McKinney, in his application, sought a "sheet metal" position, without indicating a desired salary, and showed current employment by Local 20, as an organizer, and past employment, as an apprentice, by Smithers Roofing at \$11.37 per hour. McKinney testified that he told the superintendent at Smithers, when he entered the "salt" program, that he, McKinney, would return in 6 months, which he did. According to McKinney, and other witnesses, the 6-month period of the "salt" program may be extended if the "salt" secures employment during the course of the program, and an organizing campaign ensues, which, at the end of the 6 months, is still ongoing. James Santacroce, in his application, sought a "sheet metal" position, without showing a desired salary. Santacroce testified that he was "on leave" from his job at Apex Ventilating, where he earned \$11.70 per hour, and where he returned at the conclusion of his "salt" service. Ronnie Sims was also "on leave" from Apex, where he returned following his participation in the "salt" program, when he filed his application with Kelly. Sims, who earned \$12.26 an hour at Apex, sought a "sheet metal" position with Respondent, at an "open" salary, and claimed experience as a sheet metal apprentice, and as an organizer. Peter Williams, in his application, sought "any available" position, at "open" salary, and showed current employment by Local 20, as an organizer, and past employment by Sink & Edwards, as an apprentice. Williams, who earned \$13 an hour at Sink & Edwards, testified that he was "on leave" from that company for the 6-month period of his salt service. Bobby Wright, in his application, sought a "sheet metal work" position, at "open" salary, and showed current employment by Local 20, and past employment by Blackmore & Buckner. Upon completion of his "salt" service, he returned to that company, at his wage rate of \$14 per hour, as the company knew he would. Donald McQueen, Jr., in his application, sought a "sheet metal worker" position, at "open" salary, and showed current employment by Local 20, as an organizer, and past employment as an apprentice, earning \$11.37 an hour, with C & C Sheet Metal. Upon completion of his apprentice "salt"

service, McQueen, by prearrangement, returned to C & C. He testified that some 90 percent of his experience was commercial, fabricating and installing duct work.

As to the October 9, 1995, applicants, none of them referrals, they arrived at the Kelly office together, and all wore union insignia. All of them, Abel, Barkdull, Burke, Cornwell, DeFronzo, Gray, Hail, Hegg, Hill, Huyghe, Piercefield, Reese, Rogers, Sears, Van Gordon and Walden, filled out applications showing their current employment with Local 20, as organizers, and experience in the sheet metal trade, principally, HVAC work in the residential and commercial fields. Most sought "any available" job, at virtually "any" salary, and indicated a past wage rate of \$11.70 per hour. Some of them specified in their Kelly applications that they were "on leave," or "transferred," from positions with their permanent employers while they fulfilled their third year apprenticeship "salt" obligations. Reese, at the time he submitted his application with Kelly, was earning \$52,000 per year, plus expenses and free use of a car, with the Union. His application showed that he last worked with his tools in 1982. Van Gordon, as of October 9, 1995, was earning \$21.27 an hour with the Union, plus perquisites, and had last worked with his tools in 1990. His experience, too, was in residential and commercial work, and not in industrial work. Indeed, of all the applicants, Rogers was the only one who, prior to "salt" service, worked for an industrial contractor. I note, too, that, in addition to filing second applications at the Kelly office on October 25, 1995, along with others of the October 9 applicants, Rogers and Cornwell filed applications at INET on November 27. However, it does not appear that the Company engaged in hiring relevant to this case during the November 27, to December 12, 1995, period.

The 27 Local 20 "salts," journeymen and apprentice sheet metal workers, thus filed applications with the Company during 1995, and early 1996. Many of them sought "any available" job. While Benson credibly testified that all of them were considered for employment, none of them were hired. Rather, and shortly after the submission of various of their applications, Respondent hired laborers and helpers who, demonstrably, lacked superior qualifications. The Local 20 "salts" were, of course, all union activists, and Respondent knew it. The record is replete with evidence that Kelly harbored anti-union animus and was willing to oppose organization of its employees by unlawful means, including, "screening applicants" in order to "keep the union out." Thus, the inference is warranted that Respondent refused to hire the "salts" for discriminatory reasons and, accordingly, the General Counsel has established a *prima facie* case of unlawful refusal to hire.¹²

In my view, however, Respondent has shown that it made the hiring decisions which it did on the basis of neutral application of legitimate and nondiscriminatory policies, and that it would have made these same choices even absent the union affiliations of the "salts." Thus, the record evidence shows, and General Counsel in its brief does not appear to argue otherwise, that, since the experience of the "salts" in HVAC sheet metal work was of little value to Kelly, an industrial general contractor engaged in an entirely different type of work, the "salts"

¹² See *Big E's Foodland, Inc.*, 242 NLRB 963 (1979).

qualified, only, for laborer and helper positions. Benson, in his testimony, conceded as much. However, the evidence further shows, as Benson testified, that in filling open positions, in accordance with its policies, the Company preferred to hire the referrals of its employees and customers, which the "salts" were not. It preferred to hire and train in its ways of doing things, inexperienced laborers, which the "salts" were not. It preferred to hire for positions paying \$6 to \$9 per hour, workers who were accustomed to earning in that range, and Respondent knew that the "salts" were accustomed to earning much more. In attempting to build its new company, Respondent wanted and needed employees likely to be permanent, and not temporary, and Kelly knew, because it had been so advised by Elliot and Cora, that the "salts" would not, and could not, remain with Kelly on a permanent, or other than temporary, basis. As Respondent has, thus, articulated legitimate, nondiscriminatory business reasons for not hiring the Local 20 "salt" applicants,¹³ and has shown that it would have made the same hiring decisions regardless of their union affiliation, I conclude that the Company's failure to hire them was not in violation of the Act.

4. The discharge of Brown

David Brown, a member of Local 157, was hired by Respondent as a pipefitter/welder on December 1, 1995, and was assigned to Kelly's piping crew at the Staley North plant under Superintendent Grotjan and Foreman Ramsey. Brown, who did not reveal his union affiliation to management when he was hired, worked with some 14 or 15 members of the crew, and he discussed organization with them. On or about February 23, 1996, Brown received a written reprimand for clocking in late on February 21, a disciplinary action which the Complaint alleges was taken for discriminatory reasons. As the General Counsel has not shown that, at the time of the discipline, Respondent was aware of Brown's union sympathies, that allegation must be dismissed. As earlier noted, it was approximately March 12, 1996, when Brown and Crabb approached Supervisor Fortin, together, and Crabb stated that he was there to organize.

Brown was summarily discharged by Ramsey on April 1, 1996. On that day, after he arranged to report late for work, Brown arrived at about 10:30 a.m., walked through the gate onto the Staley premises and reported to Grotjan and Ramsey at the Kelly job trailer. The employee then proceeded to his tool box, close to his work station, where his tools, work clothes and safety equipment were stored. Brown put on his coveralls, work boots and hard hat, and took one load of tools up a flight of stairs to his work area. As he was unloading the tools, where others were working, but before he, Brown, had started to work, Ramsey approached. According to Brown's testimony, Ramsey told the employee that he was being fired for failure to wear side shields on his safety glasses. When Brown asked if Ramsey was actually discharging him for such an offense, the supervisor said that, indeed, he was doing so. The Company prepared a termination slip stating that the discharge was for "repeated warnings to wear safety side shields." Brown credi-

bly testified that, in fact, he had not received prior warnings, oral or written, concerning this.

Under Staley rules, employees must wear side shields on their safety glasses while on Staley premises. Also, it is Kelly safety policy that safety glasses with side shields be worn "at all times while working." Nonetheless, the record is replete with evidence that Brown's practice of storing his safety equipment in his tool box, and putting on his side shields when he started to work, was known to the Company's supervisors and, in fact, was common among the employees. Brown was the first Kelly employee to be disciplined for failure to wear side shields.

Ramsey, in his testimony, stated that Brown, and many other employees, had been warned on numerous occasions about wearing side shields and that, on April 1, 1996, Brown was not wearing shields while in the work area and at a time when others were working. Conceding that failure to wear such side shields is not, normally, a dischargeable offense, Ramsey claimed that it was Brown's insubordination, in laughing at him when he directed the employee to put on the side shields, that led to the firing. At another point, Ramsey testified that both Brown's failure to wear the shields, and his insubordinate behavior, were the reasons for discharge. Yet, the termination notice contains no reference to insubordinate behavior.

I found Brown a forthright and believable witness. On the other hand, Ramsey did not so impress me and I found his testimony, on this and other points, to lack the ring of truth and at odds with the probable course of events suggested by the record evidence as a whole. Accordingly, I find that the happenings of April 1, 1996, occurred as described by Brown.

In light of Brown's union support, Respondent's knowledge of same and its demonstrated hostility thereto, and the timing of the discharge soon after the Company learned of Brown's organizational stance, I conclude that the General Counsel has established a very strong prima facie case of unlawful discharge under the Act. Respondent has not shown that it would have discharged Brown even absent his protected conduct. Rather, in advancing shifting and patently pretextual reasons to explain the discharge, it has failed to rebut the General Counsel's case. I find and conclude that, on April 1, 1996, Kelly discharged Brown because of his union activities, in violation of Section 8(a)(3) of the Act.

5. The layoff of Crabb

Stephen Crabb, Sr. was hired by Kelly as a pipefitter on or about the first of March, 1996, and was assigned to the piping crew at the Staley North plant. Beginning March 12, he began talking with fellow employees about the Union. Also on that date, as found, above, Crabb and Brown approached Supervisor Fortin, and Crabb informed Fortin that he, Crabb, was there to organize for Local 157.

As detailed, supra, at the end of March, Crabb distributed handbills on behalf of the Union, before work, at the gate entrance to the Staley, plant, and, later that day, unlawfully was instructed by General Superintendent Grotjan to cease solicitation activities on Staley property. Soon thereafter, on April 3, and 4, Crabb received written warnings from Supervisor Fortin, the first for leaving tools at his work station instead of returning them to the toolroom, and the second for "not working at com-

¹³ See *Windemuller Electric*, 306 NLRB 664, 680 (1992).

pany standards.” Regarding the first matter, the uncontradicted record evidence reveals that other employees, on many occasions, have left tools out and were not disciplined for it. As to the second warning, Crabb testified, without contradiction, that, when it was issued to him, Fortin was unable to point to any examples of sub-standard work except an installation job performed, not by Crabb, but by another employee. In light of Crabb’s union activities, Respondent’s knowledge of, and unlawful interference with, same, the Company’s hostility toward employee organization and willingness to oppose it by means prohibited by law, and the timing of the warnings immediately following Crabb’s handbilling for Local 157, the inference is amply warranted that a motivating factor for the disciplines was the employee’s organizational activities. As Respondent has entirely failed to show that it would have so disciplined Crabb even absent his protected conduct, I find that the disciplines were issued in retaliation for that conduct, in violation of Section 8(a)(3) of the Act.

Crabb engaged in union handbilling, on a street adjacent to the Staley North plant parking lot, on April 11, and, again, on April 12, and was observed in that endeavor by Grotjan, Ramsey and Fortin. Later on April 12, Fortin informed him that he was laid off, as part of a reduction in force, because “the job was winding down.” In fact, at the time, there was a great deal of work left to do and the members of the piping crew were working 50 hours per week. According to Crabb’s credited and uncontradicted further testimony, as Fortin escorted him out, he asked Crabb why he “wanted to cause trouble with this union.”

Grotjan testified that, on April 12, he was instructed by the customer, Staley, to reduce the Kelly work force and he, Grotjan, in turn, told Ramsey to select members of the piping crew for layoff. According to Ramsey, he picked Jason Wood and Jason Mathis, new hires who functioned, only, as helpers, J.D. Leatherwood, III, a pipefitter who requested a layoff, and pipefitters and union supporters Crabb and Jay Struthers. Ramsey testified that he selected Crabb because he was incompetent.

I have previously found Ramsey a less than credible witness and I am unwilling to assign weight, here, to his entirely unsubstantiated testimony. The General Counsel’s strong *prima facie* case, that Crabb was selected for layoff for discriminatory reasons, based upon Kelly’s knowledge of his union activities and its antipathy thereto, the prior unlawful disciplines issued to this employee, the timing of his selection for separation from employment and the remarks made by Supervisor Fortin at the time of that selection, is not easily overcome. Here, there is an entire lack of credible record evidence to show that, even absent his protected conduct, Crabb would have been chosen for layoff. I thus conclude that Respondent chose to lay off Crabb, on April 12, 1996, because of his support for Local 157, in violation of Section 8(a)(3) of the Act.

6. The layoffs of Struthers and Emmons

Jay Struthers was hired by Kelly in the Fall of 1995, as a pipefitter and welder, and was assigned to the Company’s piping crew at the Staley North plant. While working there he learned about the Union from Crabb and he, Struthers, began to assist it in its organizational activities. In April, 1996, Struthers joined Local 157.

During March of 1996, Struthers said to his supervisor, Fortin, concerning the lack of a replacement for a broken tool, that “well stuff like this wouldn’t happen if we had a union in here.” Fortin became angry and told the employee that “a union isn’t ever going to get in here because we treat our employees too good.”

As noted, Struthers, like Crabb, was laid off on April 12, 1996. At that time, he asked Ramsey and Grotjan for the reason, and was told that Kelly “needed more pipefitters than welders.” Yet, Struthers testified, during the course of his employment with the Company, he had performed pipefitting work some 50 percent of the time.

Ramsey, in his testimony, claimed that he selected Struthers for layoff on April 12, primarily because “he had a bad attitude” and came to Ramsey “complaining about everyone he worked with.” Yet, while Struthers had received prior written disciplines, mainly for clocking in late, he had not been “written up” for attitude problems.

Chad Emmons, a pipefitter and welder, was hired by Respondent at the end of 1995, and was also assigned to the piping crew at the Staley North plant. On the day he was hired, Emmons signed an authorization card designating Local 157 as his collective-bargaining representative. In April, 1996, he told Fortin that he, Emmons, “was a member of the union and was there to help organize Kelly.” Fortin shook his head and walked away. Later, Ramsey told Emmons that he “didn’t like it very good.” A few weeks later, on May 3, Ramsey told Emmons that he was being laid off because “work had slowed.” At the time, Emmons was doing welding work and was teamed with a pipefitter, Paul Becker, who was also laid off. Both Emmons and Becker were recalled, several days later, to replace other employees who unexpectedly quit.

Ramsey testified that, on May 3, Grotjan, on instruction from the Staley Company, had directed him to lay off one pipefitter and one welder. Ramsey chose Emmons and Becker, he further testified, because “they were the least productive,” and not based upon union considerations. On the other hand, Benson testified that Emmons was a good worker, and was not selected for layoff due to his work performance.

Struthers and Emmons engaged in activities on behalf of Local 157, and were laid off shortly after Respondent learned of their support for the Union. Respondent, throughout 1995, and 1996, harbored strong anti-union animus and demonstrated a willingness to oppose organization of its employees by unlawful means, including discriminatory discharges and layoffs. Thus, the inference is warranted that a motivating factor in the selections of Struthers and Emmons for layoff was their support for Local 157. Respondent has not shown, by the testimonial explanations of Ramsey, that it would have laid off those employees even absent their protected conduct. As earlier found, Ramsey was not a credible witness and I do not accept his testimony particularly where, as here, it is at odds with other evidence and the logical inferences to be drawn therefrom. I find and conclude that Struthers and Emmons were laid off, in violation of Section 8(a)(3) of the Act, because of their union support. On the other hand, the General Counsel’s further contention, that Emmons was unlawfully disciplined for lateness on February 23, 1996, is rejected, as this occurred prior to the time

that Emmons identified himself to Respondent as a union supporter.

7. The representation Case

Upon a petition filed by Local 157 on January 30, 1998, and after a representation case hearing concerning, essentially, a dispute over unit placement issues, the Regional Director, on March 10, and 17, 1998, issued a Decision and a Direction of Election in a craft unit of pipefitters and pipewelders, described as follows:

All full-time and regular part-time pipefitters and pipewelders employed by the Employer BUT EXCLUDING all millwrights, ironworkers, carpenters, laborers, crane operators, all professional employees, all clerical employees, all guards, all supervisors as defined in the Act, and all other employees.

Following the Board's April 15, 1998, denial of the Employer's Request for Review of that Decision, an election was conducted on April 16, 1998, yielding a tally of ballots showing 3 votes cast for the Union, 6 votes against the Union and 33 challenged ballots. At trial in the instant case, the parties resolved the challenged ballot issues, agreeing that the challenges to the ballots of Jeffrey Marsh, Rick Fortin and William Wood be withdrawn, and their ballots be opened and counted, and that the challenges to the remaining 30 ballots be sustained, and their ballots not be opened or counted. As a result, the challenged ballots to be opened and counted are not determinative of the results of the election.

After withdrawal, before and at trial, of most of the objections to conduct affecting the results of the election filed by Local 157, two arguably valid objections survive. The first, set forth in Objection 6, as supplemented by the "Additional Alleged Objectionable Conduct" designated by the Regional Director in his post-election report, tracks the Complaint allegations of surveillance of employee union activities, creating the impression of surveillance, interrogating employees concerning their union activities and threatening employees with discharge and other reprisals if they engaged in activities in support of Local 157, by Superintendent Kent Grotjan, on March 12, and 13, 1998, during the critical period between the filing of the petition and the conduct of the election. Having found, *supra*, that Respondent engaged in violations of Section 8(a)(1) of the Act by that conduct, I further conclude that the objections to the election, based upon the same conduct, must be sustained, and the election must be set aside and a new election ordered.

In view of my disposition, I need not determine the validity of Objection 9, that:

Despite the decision rendered by the National Labor Relations Board in a pre-election hearing that determined the proper unit, the employer knowingly submitted an improper excelsior list to the Federal Government that included no less than 22 names of persons who had no community of interest with the petitioned for unit.

I note, however, the circumstances giving rise to this objection. Thus, in addition to the 10 or 11 members of the piping crew working at the North Staley plant whom the petitioner sought to

represent,¹⁴ the Regional Director, after examining all work sites, included in the craft unit he found appropriate "the approximately two pipefitters who work at the shop [and who] share the same skills, utilizing the same tools and performing substantially the same tasks as those on the piping crew. . . ." Indeed, the two individuals referred to, Rick Fortin and Jeff Marsh, were transferred, from the Staley North plant piping crew, to the shop, some months before the representation case hearing. Nonetheless, and despite the Director's unit determination which expressly rejected a broader unit sought by the Employer, and the Board's refusal to grant review, Kelly submitted an *Excelsior* list containing the names and addresses of 33 employees, nearly three times the number of employees found by the Director to be included in the appropriate unit. In justification for the inclusion on the list of some 20 or 21 employees occupying classifications other than pipefitter or pipewelder, Kelly urges that, by describing the appropriate unit to include "all" pipefitters and pipewelders employed by Kelly, full-time and "regular part-time," the Director expanded the unit to include non-pipefitters and non-pipewelders who, nonetheless, perform, or assist in performing, pipefitting and, or, pipewelding work on a temporary, occasional, casual, or incidental basis. This argument is totally at odds with the express terms of the Director's Decision and, in my view, is not only erroneous, but frivolous, and not made in good faith.

IV. THE EFFECTS OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of Respondent set forth in Section III, above, occurring in connection with its operations described in Section I, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practice conduct in violation of Section 8(a)(3) and (1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

CONCLUSIONS OF LAW

1. Kelly Construction of Indiana, Inc. is an employer engaged in commerce, and in operations affecting commerce, within the meaning of Section 2(2), (6) and (7) of the Act.

2. Sheet Metal Workers' International Association Local Union No. 20, a/w Sheet Metal Workers' International Association, AFL-CIO, Indiana State Pipe Trades Association and UA Local No. 157, a/w United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, are, each, labor organizations within the meaning of Section 2(5) of the Act.

3. By issuing written disciplines to its employee Stephen Crabb, Sr., and by discharging employee David Brown, and laying off Crabb and employees Jay Struthers, and Chad

¹⁴ This number does not include 2 laborers whom the Regional Director did not include in the unit.

Emmons, because of their union activities and sentiments, Respondent has engaged in unfair labor practice conduct within the meaning of Section 8(a)(3) of the Act.

4. By coercively interrogating applicants and employees about their union activities and the union activities of others, threatening employees with discharge and other reprisals if they engaged in union activities, promulgating and maintaining a no-solicitation policy for discriminatory reasons, promulgating and enforcing an overly broad no-solicitation and no-distribution rule, informing employees that Respondent would not hire or consider for hire applicants for employment who are union members, keeping employees' union activities under surveillance and creating the impression among employees that their union activities were under surveillance, Respondent has engaged in unfair labor practice conduct within the meaning of Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondent has not otherwise violated the Act, as alleged in the complaint.

7.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁵

ORDER

He Respondent, Kelly Construction of Indiana, Inc., Lafayette, Indiana, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging, laying off and issuing written disciplines to employees because of their union activities and sympathies.

(b) Coercively interrogating applicants and employees about their union activities and the union activities of others, threatening employees with discharge and other reprisals if they engage in union activities, promulgating and maintaining a no-solicitation policy for discriminatory reasons, promulgating and enforcing an overly broad no-solicitation and no-distribution rule, informing employees that it will not hire or consider for hire applicants for employment who are union members, keeping employees' union activities under surveillance and creating the impression among employees that their union activities are under surveillance.

(c) In any other manner, interfering with, restraining or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days from the date of this Order, offer David Brown, Stephen Crabb, Sr., Jay Struthers and Chad Emmons, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed.

¹⁵ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

(b) Make the above-listed employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay shall be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges and layoffs and rescind and remove from its files any reference to the unlawful disciplines issued to Crabb, and within 3 days thereafter notify the employees, in writing, that this has been done and that the discharges, layoffs and disciplines will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Lafayette, Indiana, copies of the attached notice marked "Appendix."¹⁶ Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 1, 1995.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official, on a form provided by the Region, attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the election in Case 25-RC-9751 held on April 16, 1998, be set aside and the case remanded to the Regional Director for Region 25 to conduct a new election when he deems that the circumstances permit the free choice of a bargaining representative.

¹⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."